

**STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street, 21st Floor
San Francisco, California 94105**

**Proposed Amendments to Title 10, California Code of
Regulations, Chapter 5, Subchapter 4.7, Section 2632.5
[Pay-Drive (Usage Based Auto Insurance)]**

September 2, 2009

File No. REG-2008-00020

**UPDATED INFORMATIVE DIGEST AND
FINAL STATEMENT OF REASONS**

INTRODUCTION

Pursuant to Insurance Code section 1861.02(e), Insurance Commissioner Steve Poizner (“Commissioner”) has determined to amend California Code of Regulations (CCR), Title 10, Chapter 5, Subchapter 4.7, Article 3, section 2632.5 (hereafter “Section 2632.5”).

California Insurance Code (“CIC”) section 1861.02(e) requires the Commissioner to adopt regulations to implement CIC section 1861.02, including the auto rating factor provisions of that section.

CIC section 1861.02(a), added by Proposition 103, provides in relevant part:

Rates and premiums for an automobile insurance policy . . . shall be determined by application of the following factors in decreasing order of importance:

- (1) The insured's driving safety record.
- (2) The number of miles he or she drives annually.
- (3) The number of years of driving experience the insured has had.
- (4) Those other factors that the commissioner may adopt by regulation and that have a substantial relationship to the risk of loss.

These amendments are also authorized by *CalFarm v. Deukmejian* (1989) 48 Cal.3d 805, 825 [258 Cal.Rptr. 161], *20th Century v. Garamendi* (1994) 8 Cal. 4th 216, 280 [32 Cal.Rptr.2d 807], *State Farm Mutual Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1041 [12 Cal.Rptr. 3d 343], and *Spanish Speaking Citizens Foundation, Inc. v. Low* (2000) 85 Cal.App.4th 1179, 1214-17 [103 Cal.Rptr.2d 75] which recognize the Commissioner’s broad authority over insurance ratemaking.

The amendments authorize insurers to determine the number of miles the policyholder drives annually by means of a verified actual mileage program. The amendments make other related changes, as set forth below.

PURPOSE AND REASONABLE NECESSITY OF THE REGULATION

The Commissioner has determined that the proposed amendments are reasonably necessary to carry out the requirements articulated in Insurance Code section 1861.02(a). The bases for this determination and the specific purpose of the proposed amendments are set forth below.

Section 2632.5(b). A grammatical change without regulatory effect was made to this section, which now reads: Each insurer may only use the characteristics of one driver to rate each vehicle except ~~for~~ as provided for in specified sections. A 15-day public notice was provided of this proposed change.

Section 2632.5(c)(2). The addition of the words, “Except as provided in section (c)(2)(F),” to this section is necessary to specify that the newly added section 2632.5(c)(F) is an alternative to using estimated miles for the second mandatory rating factor. The words “or prospectively” were added to the sentence “Insurers may not retroactively or prospectively adjust premiums based on actual miles driven . . .” to allow an insurer in the second policy period, for example, to provide a credit to a policyholder for miles not driven in the first policy period. The word “policy-holder” was changed to “policyholder” for consistency.

Section 2632.5(c)(2)(E). Existing section (E) allowed an insurer to obtain and use smog check odometer readings from the California Bureau of Automotive Repair in an estimated mileage program. In response to public comments, and to make this section consistent with the verified actual mileage program, this section now allows an insurer to use smog check odometer readings from the California Department of Motor Vehicles, or any other governmental agency that maintains odometer readings, in addition to California Bureau of Automotive Repair odometer readings.

Section 2632.5(c)(2)(F). The purpose of the newly added section 2632.5(c)(2)(F) is to clarify, and make specific the fact that an insurer may employ verified actual mileage rather than estimated mileage as the second mandatory factor. The section includes a statement that using verified actual miles driven, rather than estimated miles driven, may enable policyholders to reduce their premiums by driving less and create incentives for innovation in automobile insurance rating in California.

The section recognizes that an insurer may offer a verified actual mileage program instead of, or in addition to, an estimated mileage program. This would allow an insurer, such as a new market entrant for example, to decide to specialize in offering verified actual mileage programs only.

Because it may be difficult and/or complicated for an insurer to rate two or more vehicles under different methods on one policy, an insurer offering both estimation and verification programs for determining mileage may require an insured who chooses verified mileage for one vehicle to choose verified mileage for all vehicles insured under the same policy. However, different mileage programs may be applied if the vehicles are covered under different policies.

Section 2632.5(c)(2)(F)(i). This new section requires insurers, in a verified actual mileage program, to verify mileage by one or more of several methods, as set forth in the regulations. The methods must be specified by the insurer in its class plan, which must be approved by the Commissioner. The methods are:

1. By odometer readings of the insured vehicle or vehicles, made by an employee of the insurer, an agent of the insurer; or a third-party vendor retained by the insurer. This is similar to the provision in existing section 2632.5(c)(2)(E) which allows an insurer to obtain and use smog check odometer readings from the California Bureau of Automotive Repair to estimate annual miles driven.

2. By odometer readings recorded by an automotive repair dealer, as defined by section 9880.1 of the Business and Professions Code, in the ordinary course of the business of servicing a vehicle, provided to the insurer by the policyholder or by a vendor retained by the insurer. This is similar to the provision in existing section 2632.5(c)(2)(D)(1) which allows an insurer to request an applicant or policyholder to provide service records which document the odometer reading of the vehicle.

3. By odometer readings obtained from smog check stations licensed by the California Bureau of Automotive Repair, from the California Department of Motor Vehicles, or any other governmental agency that maintains public records of vehicle odometer readings. Those odometer readings shall be provided by the policyholder, the government agency, or a vendor retained by the insurer. This is similar to the provision in existing section 2632.5(c)(2)(E) which allows an insurer to obtain and use smog check odometer readings from the California Bureau of Automotive Repair to estimate annual miles driven. (As indicated above, that section is also proposed for revision in this rulemaking proceeding to add that odometer readings may be obtained from the California Department of Motor Vehicles or any other governmental agency that maintains public records of vehicle odometer readings.)

4. By odometer readings reported to the insurer by the insured or by an agent of the insured. This is similar to existing section 2632.5(c)(2)(C)6 which allows the insurer to require an applicant or policyholder to provide the current odometer reading of the vehicle to be insured.

5. By a technological device pursuant to existing section (c)(2)(D)(2), which currently allows the use of a technological device provided by the insurer or otherwise made available to the insured that accurately collect vehicle mileage information. The remainder of this section is new language. An insurer shall only use a technological device to collect information for determining actual miles driven and shall not use a technological device to collect or store information about the location of the insured vehicle. This language is necessary to address the privacy concerns which were raised and which are summarized and responded to in this rulemaking file. However, the section does recognize that existing law allows a motor club or an insurer to use a technological device to collect information about the location of the insured vehicle as part of an emergency road service, theft service, map service or travel service.

6. By any other method approved by the Commissioner. This is a new provision which recognizes the Commissioner's authority to engage in case-by-case adjudication.

The originally-noticed regulation provided that if an insurer employs verified actual mileage rather than estimated mileage, the insurer must verify the mileage using one of three methods. The three methods were (1) odometer readings by an employee or agent of the insurer; (2) service records obtained from an automotive repair dealer as defined in the California Business and Professions Code section 9880.1; (3) through the use of a technological device. In response to public comments, additional options and clarifying language were added, as described above. The Commissioner has determined that it is necessary to standardize and prescribe the methods for verifying actual miles driven. This is necessary to achieve uniform results and protect

consumers from arbitrary and/or unnecessarily burdensome or invasive mileage verification techniques. These amendments specify how an insurer may verify actual miles driven.

Section 2632.5(c)(2)(F)(ii). Similar to the prior, and proposed amended, section applicable to the estimated mileage program, this section allows an insurer employing verified actual mileage to retroactively or prospectively adjust premiums based on actual miles driven if notice is given to the policyholder in advance. This section allows an insurer to reflect the actual miles driven in establishing a policy's premium, for example, by providing a refund at the end of the policy period to a policyholder who drove fewer miles or a credit on the upcoming policy to that policyholder. The original language provided that, if an insurer employs verified actual mileage rather than estimated mileage, the insurer may retroactively adjust premiums based on actual miles driven provided the policyholder is notified before the effective date of the policy. In response to public comment, the regulation was amended to allow an insurer to prospectively adjust premium in the upcoming policy period based on actual miles driven in the past.

One way for an insurer to apply actual miles driven is to adjust the premium after the actual miles driven are verified and known. These amendments are necessary to make clear the permissibility of using verified actual miles driven for subsequent premium adjustment. This is only permissible provided the insurer has also given advance notification to the consumer that the premium may be adjusted based on the number of miles actually driven.

Section 2632.5(c)(2)(F)(iii). This new section allows an insurer offering both a mileage estimation program and a verified actual mileage program to provide a discount to a policyholder who participates in a verified actual mileage program. The discount must be based on demonstrated cost savings or actuarial accuracy and all policyholders in the verified actual mileage program, regardless of the method of verification used, shall qualify for a discount. However, the amount of discount may vary based on the verification method used by or for a particular insured. The final language differs from the originally-proposed language, which provided that if an insurer employs verified actual mileage rather than estimated mileage, the insurer may provide a discount to reflect any cost savings or increased actuarial accuracy associated with the use of verified actual mileage, provided the discount has been filed with and approved by the Commissioner. The Commissioner believes that this language will provide an incentive to participate in verified actual mileage programs. These amendments are necessary to allow insurers to provide discounts to consumers who use verified actual mileage as opposed to estimated mileage programs. This would allow policyholders who choose this option the opportunity to reduce their premiums if they drive fewer miles.

Section 2632.5(c)(2)(F)(iv). Under this new section, if an insurer offers both an estimated mileage program and a verified actual mileage program, a policyholder's participation in a verified actual mileage program shall be voluntary. The originally proposed language indicated that an insurer can only use verified actual mileage at the option of the insured and the insurer cannot require it as a condition to purchase insurance. This section recognizes that some insureds may prefer to continue to obtain insurance from insurers who offer the traditional mileage estimation method. Additionally, some insurers may prefer not to develop a verified actual mileage program at this time. At the same time, this section recognizes that there may be some insurers who choose to offer only a verified actual mileage program, and permits them to do so.

Section 2632.5(c)(2)(F)(v). Under this new section, an insurer employing verified actual mileage shall make available all verification methods it offers to all insureds equally. No insurer shall offer or use a verification method that is not uniformly offered to the public. This section is necessary to ensure that all products an insurer offers are made available in a non-discriminatory manner.

Section 2632.5(c)(2)(F)(vi). Under this new section, if an insurer offers both a mileage estimation program and a verified actual mileage program, it shall include both programs in one class plan. This is necessary to allow for complete review of an insurer's mileage programs.

Section 2632.5(c)(2)(F)(vii). Under this new section, an insurer employing verified actual mileage pursuant to section (c)(2)(F) may offer the policyholder an option to purchase coverage for a specified price per mile ("Price Per Mile Option") provided the Price Per Mile Option complies with all applicable laws. This is necessary to allow insurers the flexibility to further develop verified actual mileage programs which rate policies based on a price per mile driven.

Section 2632.5(c)(2)(F)(viii). Under this new section, an insurer employing verified actual mileage pursuant to section (c)(2)(F) may combine Percent Use, Academic Standing, Gender, Marital Status, and Driver Training with the Second Mandatory Rating Factor. If an insurer elects to do so, the insurer shall demonstrate in its class plan that the rating factors used in combination, when considered individually, comply with the weight ordering requirements of Section 2632.8. This is similar to existing section 2632.5(e), which allows insurers to combine the same optional rating factors with the Third Mandatory Rating Factor.

Section 2632.5(c)(2)(G). Because of the proposed addition of a new section (F), current section 2632.5(c)(2)(F) has been renumbered section 2632.5(c)(2)(G). No other changes have been made to this section.

Section 2632.5(c)(2)(H). Because of the proposed addition of a new section (F), current section 2632.5(c)(2)(G) has been renumbered section 2632.5(c)(2)(H). No other changes have been made to this section.

Section 2632.5(c)(2)(I). Because of the proposed addition of a new section (F), current section 2632.5(c)(2)(H) has been renumbered section 2632.5(c)(2)(I). No other changes have been made to this section.

Section 2632.5(e). This section allowed specified optional rating factors to be combined with the Third Mandatory Factor, years of driving experience. Proposed new section 2632.5(c)(2)(F)(viii) allows an insurer employing verified actual mileage to combine the same specified optional rating factors with the Second Mandatory Rating Factor, number of miles driven annually. Because of the language in new section 2632.5(c)(2)(F)(viii), nonsubstantive clarifying changes were made to this section. For example, this section previously stated that the three mandatory factors may not be combined, except the specified optional rating factors may be combined with years of driving experience. Because proposed section 2632.5(c)(2)(F)(viii) also allows combining of factors, the language "except as expressly provided in this subsection and in section 2632.5(c)(2)(F)(vii)" was added to this section. Public notice was provided of the changes proposed to this section.

UPDATED INFORMATIVE DIGEST

Except as set forth below, the material contained in the Informative Digest is still accurate and the Department hereby incorporates by this reference the Informative Digest included in the Notice of Proposed Action.

Effect of Proposed Action

The proposed amendments to CCR Section 2632.5 will further the implementation of Proposition 103 and the auto rating factors. This will be accomplished primarily by expanding the use of the actual number of miles an insured drives as opposed to estimating the number of miles the insured will drive, and by improving the correlation between automobile premiums and the actual number of miles an insured drives. The proposed amendments allow an insurer employing a verified actual mileage program to combine specified optional rating factors with Annual Miles Driven, as long as the insurer demonstrates in its class plan that the rating factors used in combination, when considered individually, comply with the regulatory weight ordering requirements.

The Department issued a Notice of Proposed Action and Notice of Public Hearing for this rulemaking proceeding on September 5, 2008.

A Notice of availability of changed text was issued on June 24, 2009. As indicated in the Notice, public comments were accepted through the close of business on July 9, 2009.

A second Notice of availability of changed text was issued on July 31, 2009. As indicated in the Notice, public comments were accepted through the close of business on August 17, 2009.

Policy Statement Overview

There are no changes to the Policy Statement Overview.

IDENTIFICATION OF STUDIES UPDATE OF MATERIAL RELIED ON

As indicated in the Initial Statement of Reasons, the Department has not relied upon any studies in connection with this rulemaking proceeding. Other than public comments and other required rulemaking documents, no material has been added to the rulemaking file and no additional material has been relied upon.

MANDATE UPON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Commissioner has determined that the proposed regulations will not impose a mandate upon local agencies and school districts.

SPECIFIC ACTIONS, PROCEDURES, TECHNOLOGIES OR EQUIPMENT

As indicated in the Initial Statement of Reasons, adoption of the proposed changes would not mandate the use of specific actions, procedures, technologies or equipment.

REASONABLE ALTERNATIVES

As indicated in the Initial Statement of Reasons, offering a verified actual mileage program, as opposed to an estimated mileage program, is an option for insurers under this regulation. Performance standards were considered but were rejected as an unreasonable and impracticable alternative for determining the actual number of miles driven for the second mandatory rating factor. To the extent public comments could be considered as suggesting an alternative that would be more effective, or as effective and less burdensome to affected persons than the proposed regulations, the Commissioner hereby incorporates by this reference his response to those comments set forth elsewhere in this rulemaking file. The Commissioner has determined that there are no alternatives that would be more effective, or as effective and less burdensome to affected persons, than the proposed regulations.

ECONOMIC IMPACT ON SMALL BUSINESS **SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS**

As indicated in the Initial Statement of Reasons, the Commissioner has determined that adoption of the proposed regulation will not have a significant, statewide adverse economic impact directly affecting small businesses. Because the provisions of the proposal are not mandatory, the Commissioner has determined that adoption of the proposed regulation will not have a significant adverse economic impact on business.

PRENOTICE PUBLIC DISCUSSIONS

As indicated in the Initial Statement of Reasons, pursuant to Government Code Section 11346.45, and California Code of Regulations, Title 10, section 2646.3, the California Department of Insurance held a publicly noticed workshop on the topic of this regulation on June 23, 2008.

SUMMARY OF AND RESPONSE TO PUBLIC COMMENTS

A summary of all comments received, and the response thereto, is included elsewhere in this rulemaking file.